Defendants' Exhibit B. 1399

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post-Office Building in the Borough of Manhattan, City of New York, on the 3rd day of May, 1910.

Present—Hon. District Judge.

1400

In the Matter

of

Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood individually and as co-partners doing business under the firm name and style of J. M. Fiske & Company,

Bankrupts.

Upon the annexed petition of Josiah M. Fiske 1401
verified the 2nd day of May, 1910, it is

Ordered that the individual schedules of Josiah M. Fiske and especially "B. (4)" be and it is hereby amended in accordance with the annexed petition and annexed proposed schedule.

Samuel Miller,
Referee in Bankruptcy.

1402 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

DUDLEY T. HUMPHREY, CLIFFORD M. WASHBURN, JOSIAH M. FISKE and ARTHUR C.
1403 SHERWOOD, individually and as co-partners doing business under the firm name and style of J. M. FISKE & COMPANY,

Bankrupts.

The petition of Josiah M. Fiske respectfully shows:

That your petitioner is one of the bankrupts herein and was duly adjudicated such on the 12th day of March, 1910.

1404 That thereafter and in pursuance of an order of this Court the schedules were duly filed, containing both the assets and liabilities of the firm and those of your petitioner. That no trustee has been elected or appointed and no examination of the bankrupt been had.

That in examining Schedule "B. (4)" your petitioner found that he has overlooked a possible interest in the estate of Josiah M. Fiske belonging to your petitioner. That your petitioner desires to amend Schedule "B" 4" so that against the question in such schedule, to-wit:—"Rights and powers, legacies and bequests" instead of answer "None,"

should appear as "A possible contingent interest 1405
in the Estate of Josiah M. Fiske," in which the Trustee may have an interest, the value of said interest being unknown to your petitioner. Annexed hereto is such amended schedule. That no previous application has been made.

Dated, New York, May 2nd, 1910.

JOSIAH M. FISKE.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

JOSIAH M. FISKE, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition, that he has read the foregoing petition 1406
and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

JOSIAH M. FISKE.

Sworn to before me this }
2nd day of May, 1910. }
EMANUEL B. COHEN,
Commissioner of Deeds,
New York City, N. Y.

1407

1408

SCHEDULE B (4).

PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, including Property held in Trust for the Debtor, or subject to any Power or Right to dispose of or to charge.

General Interest	Particular Description	Supposed Value of my Interest
Interest in Land,	None	
Personal Property.	None	
Property in money, stocks, bonds, annuitions, etc.		
Rights and powers, legacies and bequests.		
1409	A possible contingent interest in the Estate of Josiah M. Fiske	

Property Heretofore Conveyed for Benefit of Creditors.		Amount Realized from Proceeds of Property Conveyed.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise for benefit of creditors date of such deed, name and address of property to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor.	None	
What sums or sums have been paid to counsel, and to whom, for services rendered or to be rendered 1410 in this bankruptcy.	None	

JOSIAH M. FISKE,
Petitioner.

OATH TO SCHEDULE B. 1411

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

IN THE MATTER
OF
J. M. FISKE,
Bankrupt.

On this 2nd day of May, A. D., 1910, before me personally came Josiah M. Fiske, the person mentioned in and who subscribed to the foregoing 1412
Schedule, and who, being by me first duly sworn, did declare the said Schedule to be a statement of all his individual estate, both real and personal, in accordance with the Act of Congress relating to bankruptcy.

JOSIAH M. FISKE.

Subscribed and sworn to before me
this 2nd day of May, A. D. 1910.

EMANUEL B. COHEN,
Commissioner of Deeds,
New York City, N. Y.

1413

Defendants' Exhibit C.

"The undersigned, being desirous of purchasing at least 20,000 shares of the common stock of the COLUMBUS & HOCKING COAL & IRON COMPANY, do hereby agree to purchase the same, or so much thereof as in the opinion of the hereinafter appointed manager may be deemed advisable, in the proportion set opposite the respective names of said subscribers and we hereby appoint James R. Keene our agent and manager to make such purchases at such time or times before the first day of September, 1909, unless sooner dissolved by the majority of the stock sub-

1414 scribed, in such manner and amounts and at such prices as in his judgment shall be to our mutual advantage.

Each one signing this agreement to pay on demand for such of said purchases as his subscription (as near as may be practicable) bears to the whole amount subscribed, as such agent or manager may require. Also return the same amount of certificates or part thereof at any time when called for before the first day of September, 1909, on receiving from the manager the amount paid therefor, with interest at five per cent. per
1415 annum. We further agree on any call from said manager to deliver to said manager the same certificates theretofore delivered to us by him.

Further, we hereby authorize the said agent and manager to sell at his discretion the whole or any part of the certificates purchased and again buy, so buying and selling at his discretion.

It is further agreed that any profits or losses incurred through the purchase and sale of said certificates shall be divided in proportion to the amount subscribed for
1416 by each one signing this agreement. No one signing this agreement shall have the right to call for a statement of accounts growing out of transactions herein authorized, except on the request in writing of 60 per cent. in amount of certificates subscribed.

We hereby agree to reimburse the said agent and manager for any commissions paid by him to such brokers as he may deem advisable to employ in the execution of the herein authorized purchases and sales and such other expenses as he may incur and which to him may seem for the best interests of all parties to this agreement.

This agreement is not to be binding on 1417
the undersigned until certificates for 20,
000 shares are subscribed and thereupon this
agreement shall become operative. Sub-
scriptions beyond this amount may be re-
ceived by the agent and manager up to
30,000 shares.

The original hereof shall be signed by the
manager. Counterparts hereof may be
signed by subscribers and all shall be taken
together and deemed to be one original in-
strument, and upon the agreement becom-
ing operative the manager shall notify the
subscribers.
1418

In Witness Whereof, the parties have
signed this agreement as of March 1st, 1909."

Defendants' Exhibit D.

MARCH 6, 1909.

MESSRS. J. M. FISKE & CO.,
42 Broadway,
N. Y. City.

GENTLEMEN:

I am in receipt of your subscription to 1419
the Columbus & Hocking Coal & Iron Com-
pany Pool Agreement dated March 1, 1909,
for 2,000 shares. Pursuant to the agreement
I desire to notify you that the number of
shares necessary to make the agreement
binding has been subscribed and therefore
the agreement has become operative. Kindly
acknowledge receipt of this notice and
oblige

Yours very truly,
JAMES R. KEENE,
Manager.

1420

Defendants' Exhibit E.

Not printed by agreement.

(See Stipulation, page 271.)

Defendants' Exhibit F.

JULY 14, 1909.

MESSRS. J. M. FISKE & CO.,
42 Broadway,
New York City.

GENTLEMEN:

1421 You have been allotted a four thousand share interest in a twenty thousand share account in the common stock of the Columbus & Hocking Coal & Iron Company, to be managed by myself.

You are to hold yourself in readiness to receive through me your proportionate share of all purchases and to deliver to me as manager the same certificates theretofore delivered by me to you.

I am to buy at my discretion and to sell the whole or any part of the certificates purchased and again buy and sell at my discretion; any profits or losses shall be divided

1422 in proportion to the amount subscribed by each member and the commissions and expenses, if any, shall be borne in like manner.

This account will operate until March 1, 1910.

Kindly acknowledge receipt of this letter, assenting to its terms.

Very truly yours,
(Signed) JAMES R. KEENE.

Defendants' Exhibit G.

Not printed by agreement.

(See Stipulation, pages 271-2.)

Defendants' Exhibit H.

1423

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HUMPHREY, CLIFFORD M. WASHBURN, JOSIAH M. FISKE and ARTHUR C. SHERWOOD, individually, and as co-partners composing the firm of J. M. Fiske & Co., and the firm of J. M. FISKE & CO.,

Plaintiffs,

1424

AGAINST

JAMES R. KEENE; FRANCIS C. BISHOP and WILLIAM LAIMBEER, composing the firm of Bishop, Laimbeer & Co.; OTTO WAGNER, JOHN S. DICKERSON and TRISTRAM R. COFFIN, composing the firm of Wagner, Dickerson & Co.; S. REED ANTHONY, NATHAN ANTHONY, WILLIAM A. TUCKER, PHILIP L. SALTONSTALL, CHAUNCEY ELDRIDGE, composing the firm of Tucker, Anthony & Co.; JOHN B. VAN SCHAICK and DERBY CRANDALL, composing the firm of Van Schaick & Co.; ATTWOOD VIOLETT, ERNST VON MEYSENBUG, ARTHUR TERRY, W. LANIER WASHINGTON, CAMPBELL W. STEWARD and THEODORE B. DEEMS, composing the firm of Attwood Violett & Co.; HENRY D. HOTCHKISS, as Trustee in Bankruptcy of Lathrop, Haskins & Co.; and EDWARD POPPER, ARTHUR W. POPPER, SIDNEY M. STERNBACH and JOSEPH LOEWI, composing the firm of Popper & Sternbach,

1425

Defendants.

The complaint of the plaintiffs, by Hays, Hershfield & Wolf, their attorneys, respectfully shows

1426 to this Court, and alleges, upon information and belief:

I.—That at all of the times hereinafter mentioned, Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood were co-partners in business in the City of New York, under the firm name and style of 'J. M. Fiske & Co.'

II.—That at all of the times hereinafter mentioned, Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi were co-partners in business in the City of New York, under
1427 the firm name and style of 'Popper & Sternbach.'

III.—That at all of the times hereinafter mentioned, Francis C. Bishop and William Laimbeer were co-partners in business in the City of New York, under the firm name and style of 'Bishop, Laimbeer & Co.'

IV.—That at all of the times hereinafter mentioned, Otto Wagner, John S. Dickerson and Tristram R. Coffin were co-partners in business in the City of New York, under the firm name and style of 'Wagner, Dickerson & Co.'

1428

V.—That at all of the times hereinafter mentioned, S. Reed Anthony, Nathan Anthony, William A. Tucker, Philip L. Saltonstall and Chauncey Eldridge were co-partners in business in the City of New York, under the firm name and style of 'Tucker, Anthony & Co.'

VI.—That at all of the times hereinafter mentioned, John B. Van Schaick and Derby Crandall, were co-partners in business in the City of New York, under the firm name and style of 'Van Schaick & Co.'

VII.—That at all of the times hereinafter men- 1429
tioned, Attwood Violett, Ernst von Meysenbug, Arthur Terry, W. Lanier Washington, Campbell W. Steward and Theodore B. Deems, were co-partners in business in the City of New York, under the firm name and style of 'Attwood, Violett & Co.'

VIII.—That on March 24th, 1910, Henry S. Haskins and Henry Leverich, individually and as co-partners trading as Lathrop, Haskins & Co., being composed of said individual and general partners, and Fannie G. Lathrop as special partner, were duly adjudicated bankrupts, and at the 1430
first meeting of creditors of said bankrupts duly held on the 18th day of April, 1910, Henry D. Hotchkiss was duly elected Trustee in Bankruptcy of said Henry S. Haskins, Henry Leverich and Lathrop, Haskins & Co., and has duly qualified as such, and has ever since been acting as such Trustee of the goods, assets and effects of the aforesaid bankrupts.

IX.—That heretofore, and on the 19th day of January, 1910, three certain creditors of said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually 1431
and as co-partners composing the firm of J. M. Fiske & Co., and of said firm of J. M. Fiske & Co., duly filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, an involuntary petition in bankruptcy, in pursuance of an Act of Congress, entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States,' approved July 1, 1898, and the amendments thereof and thereto, praying that the said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually, and as co-part-

1432 ners, aforesaid, and said firm, be adjudged bankrupts within the purview of said Act.

X.—That thereafter, and on the 12th day of March, 1910, the prayer of said petitioning creditors was duly granted, and an order of adjudication was duly entered in said bankruptcy proceedings by Hon. Learned Hand, one of the Justices of the District Court of the United States for the Southern District of New York, adjudging that the said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually, and as co-partners composing the said firm
1433 of J. M. Fiske & Co., and said firm of J. M. Fiske & Co., were bankrupts.

XI.—That thereafter, said proceedings in bankruptcy were duly referred to Hon. Seaman Miller, one of the Referees in Bankruptcy of the District Court of the United States for the Southern District of New York, and in pursuance of such order of reference, and on or about the 5th day of May, 1910, a first meeting of creditors of said bankrupts was duly held as provided by said Act of Congress relating to bankruptcy, at which said meeting the plaintiffs herein were duly appointed and elected Trustees of the estate in bankruptcy
1434 of said bankrupts.

XII.—That thereafter, the appointment of plaintiffs as such Trustees was duly approved, and the bond of said Trustees in the penal sum of $50,000, conditioned upon the faithful performance of their duties as such Trustees, was duly filed and thereafter duly approved both as to form and sufficiency, and an order approving such bond was duly filed, and plaintiffs have ever since been, and still are, acting as the Trustees in bankruptcy of the said bankrupts.

XIII.—That by virtue of the order of their ap- 1435
pointment and the qualification as such trustees, and the provisions of the Act of Congress relating to bankruptcy, the plaintiffs herein, as Trustees, have become vested with all the property of the said bankrupts of whatever kind, nature, character, or description, as of the date that the said bankrupts were adjudicated bankrupts, to wit, March, 12th, 1910, and became vested with all rights of action which creditors of said bankrupts had at the time of the said adjudication in bankruptcy.

XIV.—That heretofore, and on or about the 14th day of July, 1909, an agrement was entered into by 1436
and between the bankrupts composing said firm of J. M. Fiske and Co. and the bankrupts composing the firm of Lathrop, Haskins & Co and the defendants, other than the defendants Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, and the defendant Hotchkiss, as trustee as aforesaid, that the said parties should and did for a good and valuable consideration enter into a joint venture, which should continue until the first day of March, 1910, for the purchase of 20,000 shares of the common stock of the Columbus & Hocking Coal & Iron Co.

XV.—That is was further mutually understood 1437
and agreed by the said parties that the said defendant Keene should act as manager, agent and trustee for the other members of the said joint venture in and for the purchase and sale of said stock, and the said defendant Keene agreed further that he would not, during the term of the said agreement and the operation of the said joint venture, sell any of the stock of the Columbus & Hocking Coal & Iron Co. owned by him, or thereafter acquired by him.

1438 XVI.—That it was further mutually understood and agreed by the said parties that they should and did subscribe to the said undertaking for the purchase of 20,000 shares, and that their interest in the said joint venture should be in the proportion to the said subscription, *viz.*:

Attwood, Violett & Co.....	1,000 shares.
Tucker, Anthony & Co.....	1,000 shares.
Van Schaick & Co.....	1,000 shares.
Wagner, Dickerson & Co....	1,000 shares.
Bishop, Laimbeer & Co.....	1,000 shares.
J. M. Fiske & Co.....	4,000 shares.
1439 James R. Keene.....	4,000 shares.
Lathrop, Haskins & Co.....	7,000 shares.
Total	20,000 shares.

XVII.—That each of the parties to said agreement agreed to hold himself in readiness to receive from the defendant Keene, as manager, agent and trustee for the said joint venture, and as manager, agent and trustee for the said members thereof his proportionate share of all purchases of said stock and upon receipt thereof to pay for the same and thereafter to deliver to the defendant Keene as such manager, agent and trustee, upon demand, the iden-
1440 tical certificates theretofore delivered by the defendant Keene as such manager, agent and trustee.

XVIII.—That thereafter the said parties entered in and upon the execution of the said joint venture through the defendant Keene as agent, manager and trustee, and the defendant Keene made purchases and sales of the said stock as agent and in trust for the parties to said agreement.

XIX.—That thereafter, and prior to the commencement of this action, said defendant Keene continued as agent, manager and trustee for the said

joint venture to buy and sell the said stock for the account of himself, and the said parties to the said agreement. That the entire management and control of said joint venture was vested in and exercised by the defendant Keene, and that large sums of money have come into the possession of defendant Keene as manager, agent and trustee for the said members of the said joint venture, which the defendant Keene has declined and refused to pay to his *cestuis que trust* in the proportion to which they are entitled thereto. 1441

XX.—That the bankrupts composing the firm of J. M. Fiske & Co. have, and the said firm of Fiske & Co. has, duly performed and complied with all the terms, conditions and provisions of said agreement and of said joint venture on their part and on its part to be performed. 1442

XXI.—That the term of the said joint venture has expired, and that no accounting has ever been rendered by the defendant Keene, nor by any of the other parties thereto, to any of the parties hereto, of the transactions of the said joint venture. That the defendant Keene has made large profits in and about the purchase and sale of said stock for the account of the said parties to the said agreement for which he has wholly failed to account and which he has failed to pay over. 1443

XXII.—That the defendant Keene, with intent to defraud the other parties hereto, and in bad faith, and with the intention of making personal profit for himself, and causing a loss to the other members of the said joint venture, secretly and in violation of the provisions of the said agreement, made various purchases and sales of the said stock which resulted in losses to the other members of the said joint venture, and in large profits to himself.

1444 XXIII.—That on or about the 18th and 19th days of January, 1910, the defendants Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, composing the firm of Popper & Sternbach, were brokers for said defendant Keene, and as such brokers held for the account of the said defendant Keene approximately 7,650 shares of Columbus & Hocking Coal & Iron Co. stock, the greater portion thereof being the allotment of the said stock of said defendant Keene in the said joint venture.

XXIV.—That on or about the 18th and 19th days
1445 of January, 1910, the defendant Keene, in direct violation of his agreement with the members of the said joint venture, directed said defendants composing the firm of Popper & Sternbach to sell approximately 6,900 shares of the said stock at prices in advance of the prices at which said stock has since sold, and is now selling.

XXV.—That the said defendants composing the firm of Popper & Sternbach combined with the defendant Keene to sell the said stock, and that it was sold for the account of said defendant Keene and that the defendants composing the firm of Popper
1446 & Sternbach and the defendant Keene realized therefor large sums of money, and that the said stock was sold at prices in advance of the prices at which the said stock has since sold and is now selling.

XXVI.—That said defendants composing the firm of Popper & Sternbach, contend that said sales were made for their own account, and were what is known as 'short' sales, and that in order to make good said sales, they made deliveries of the stock of the defendant Keene which was then in their custody and possession as brokers of said defendant

Keene, and they further contend that any and all profits arising from the said sales and transactions were and are their own property and belong to them, and that the defendant Keene is not entitled thereto, and that the said defendants composing the said firm of Popper & Sternbach still hold and retain said profits and the benefits of said transactions. 1447

XXVII.—That the defendants composing the firm of Popper & Sternbach further contend that in making deliveries of said stock, they acted by permission and authority of the defendant Keene, and that the defendant Keene acquiesced therein and thereto. 1448

XXVIII.—That the sale of said stock, and the delivery thereof, by the defendants composing the firm of Popper & Sternbach, if made for the defendant Keene, was a direct violation by the defendant Keene of his duties and obligations to the parties of the said agrement.

XXIX.—That in any event, said defendant Keene is entitled to demand and collect said profits for the benefit of the parties to the said agreement, but in violation of his said duties and obligations under the said agreement, has wrongfully acquiesced in the said contention of the defendants composing the firm of Popper & Sternbach, and has permitted, and still wrongfully permits, said defendants composing the firm of Popper & Sternbach to retain the said profits derived from said alleged 'short' sales and the benefits of said transactions. 1449

XXX.—That in any event it was the duty and obligation of the defendant Keene to adopt as his own and to ratify said sales of stock made by the defendants composing the firm of Popper & Sternbach

1450 and to demand and collect from said defendants on behalf of, and for the benefit of, the parties to the said agreement, the members of the joint venture aforesaid, all profits accruing and accrued to the defendants composing said firm of Popper & Sternbach by reason of said alleged 'short' sales, and which, as plaintiffs are informed and believe, amount to upwards of $300,000.

XXXI.—That the said parties to the said agreement, the members of the said joint venture, are entitled to the profits earned by the said defendant Keene and defendants composing the firm of Pop-
1451 per & Sternbach upon said alleged 'short' sales of said stock, which plaintiffs verily believe to have been in fact sales ordered made by the defendant Keene in violation of the term and provisions of said agreement.

XXXII.—That the parties hereto other than the defendants composing the firm of Popper & Sternbach are entitled to an accounting from the defendants composing said last-mentioned firm of all profits earned by the said firm upon said alleged 'short' sales of said stock and the deliveries made pursuant thereunder, and, in any event, are entitled
1452 to have the defendants composing said firm account in this action to the defendant Keene for the benefit of all the parties to the said agreement.

XXXIII.—That the said defendant Keene still has and retains in his possession, profits and property of the said joint venture and its members, and that no accounting has ever been had between any of the parties hereto of the affairs of the said joint venture.

XXXIV.—That plaintiffs have no adequate remedy at law.

XXXV.—That leave has been given this suit by order duly obtained of the United States District Court for the Southern District of New York. 1453

Wherefore plaintiffs pray:

(1) That there be an accounting decreed between the parties hereto of the affairs of the said joint venture.

(2) That the rights of the parties hereto in and to the funds of the said joint venture and the profits thereof be determined.

(3) That the defendant Keene be ordered, adjudged and decreed to account to the plaintiffs, and to the defendants herein, other than the defendants composing the firm of Popper, Sternbach & Co., for said profits by reason of his unauthorized permission to the said defendants, Popper & Sternbach, to make said alleged 'short' sales. 1454

(4) That in addition thereto, the defendant Keene be ordered, adjudged and decreed to account to the plaintiffs and to the defendants herein other than the defendants composing the firm of Popper & Sternbach for any and all other sales and purchases made by him of the said stock.

1455

(5) That the plaintiffs on their own behalf, and on behalf of the defendants other than defendant Keene and defendants Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, composing the firm of Popper & Sternbach, have judgment against said defendant Keene for the damages sustained by reason of the violations of said agreement on the part of the said defendant Keene.

(6) That the defendants, Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph

1456 Lewis, composing the firm of Popper & Sternbach, be ordered, adjudged and decreed to account to the plaintiffs, and to the other defendants herein, or to the defendant Keene for the benefit of the plaintiffs and the defendants herein other than the defendants composing the firm of Popper & Sternbach, for any and all profits earned, or to be earned, by the said defendants composing the said firm of Popper & Sternbach, upon said alleged 'short' sales of stock of the Columbus & Hocking Coal & Iron Co.

And that the plaintiffs may have such other and further relief as to the Court may seem just and
1457 proper, together with the costs of this action.

HAYS, HERSHFIELD & WOLF,
Attorneys for Plaintiff,
Office & Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

City and County of New York, ss.:

BRUCE L. ERNST, being duly sworn, says that he is one of the plaintiffs in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own
1458 knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

BRUCE L. ERNST.

Sworn to before me this
28th day of May, 1920.
ELI M. COHEN,
Notary Public,
New York County.

Defendants' Exhibit L.

1459

N. Y. SUPREME COURT.

IRVING L. ERNST, and others as Trustee, etc., of J. M. Fiske & Co.,

AGAINST

JAMES R. KEENE and others.

Action No. 1.

The separate answer of James R. Keene, one of the defendants to the complaint of the plaintiffs in the above entitled action. 1460

UPON INFORMATION AND BELIEF.

FIRST.—The said defendant answering the said complaint denies that he has any knowledge or information sufficient to form a belief of the allegations contained in the paragraphs of said complaint numbered from I to XIII, both inclusive, and XXXV.

The said defendant denies the allegations contained in the paragraphs of said complaint numbered from XVI to XXV, both inclusive, and XXVIII to XXXIV, both inclusive. He admits and alleges however: 1462

That said plaintiffs represent those constituting the late firm of J. M. Fiske & Company;

That heretofore, to wit, on or about the 14th day of July, 1909, an agreement in writing was entered into between this defendant and the firms of Atwood Violett & Company, Tucker, Anthony & Company, Van Schaick & Company, Wagner, Dickerson & Company, Bishop, Laimbeer & Company, J. M. Fiske & Company, and Lathrop, Haskins & Company.

1462 That the said agreement so entered into was expressed in letters addressed to each of said parties, all being of the same tenor and date except as to the name of the addressee and the number of shares allotted, one of which letters was as follows:

"JULY 14, 1909.

MESSRS. VAN SCHAICK & Co.,
No. 7 Wall Street,
New York City.

GENTLEMEN:

1463 You have been allotted a one thousand share interest in a twenty thousand share account in the common stock of the Columbus & Hocking Coal & Iron Company, to be managed by myself.

You are to hold yourself in readiness to receive through me your proportionate share of all purchases and to deliver to me as manager the same certificates thereto[illegible] delivered by me to you.

I am to buy at my discretion and to sell the whole or any part of the certificates purchased and again buy and sell at my discretion; any profits or losses shall be divided

1464 in proportion to the amount subscribed by each member and the commissions and expenses, if any, shall be borne in like manner.

This account will operate until March 1, 1910.

Kindly acknowledge receipt of this letter, assenting to its terms.

Very truly yours,

(Signed) JAMES R. KEENE."

That the several addressees of said letters, all of whom accepted and agreed to the terms thereof and

the numbers of shares in respect to which they sev- 1465
erally became bound, were as follows:

Atwood Violett & Co.	1,000 shares
Tucker, Anthony & Co.....	1,000 "
Vam Schaick & Co.	1,000 "
Waggner, Dickerson & Co....	1,000 "
Bishop, Laimbeer & Co.....	1,000 "
J. M. Fiske & Co.....	4,000 "
Lathrop, Haskins & Co.....	7,000 "
James R. Keene.....	4,000 "
Total 20,000	"

That not only was there intentionally omitted 1466
from the said agreement any provision limiting the right of tthe subscribers to deal in the said stock as they should see fit, but it was expressly understood and agreed by the subscribers that this defendant and every other subscriber should be free to sell any stock he might own, and conduct such other operations in the said stock for his own account as he should see fit, save and except that the certificates representing distributions of pool stock should be held subject to call.

That in the relation created by the said written agreement and the said understanding and agree- 1467
ment as to the right of this defendant and the other members of said pooling arrangement to conduct individual operations in the said stock and not otherwise, this defendant proceeded to acquire and distribute stock for said pool and to re-sell the same from time to time until shortly before January 29, 1910; and that incidentally this defendant and said firm of Lathrop, Haskins & Co. together for their joint account and separately for the individual account conducted operations in said stock as they had a perfect right to do, and as was done by the other members of the pooling arrangement; that as to the 7,000 shares of the said stock which

1468 were owned by this defendant on the 9th day of March, 1909, all of the same with the exception of 800 shares had been sold long prior to the formation of the said pooling arrangement.

That the term of the arrangement covered by the said agreement has expired.

The said defendant admits the allegations contained in the paragraphs of said complaint numbered XXVI and XXVII.

The said defendant denies each and every allegation in the said complaint contained not hereinbefore specifically admitted or denied.

1469 SECOND.—For a further separate and distinct complete defense to the entire pretended cause of action alleged in the said complaint, and as a counterclaim thereto, the said defendant relying upon the allegations, admissions and specific denials in the preceding defenses contained, in the same manner as if the same were here repeated at length, further answering alleges:—

That the said firm of J. M. Fiske & Co broke the agreement hereinabove admitted to have been made in the following particulars, that is to say, by recklessly entering upon and prosecuting speculations in said stock of a magnitude out of all proportion
1470 to their financial resources; and by conducting as brokers for and promoting in the conducting by other brokers for irresponsible individuals of important operations in said stock on slender margins and in some cases without margins, whereby the parties to said pooling arrangement, including this defendant, were placed in a position of grave peril through the inability of said J. M. Fiske & Co., and their customers and associates outside of said pooling arrangement to sustain the effect of any important recession in the market price of said stock; all of which wrongful acts and omissions tended directly toward precipitating and on the

19th day of January, 1910, did precipitate a disas- 1471
trous panic and the fall of the market price of said stock from about $88 per share to about $15 per share, to the damage of this defendant in the sum of $250,000.

SOLOMON HANFORD,
41 Wall Street, Manhattan,
New York City,
Attorney for said defendant.

County of New York, ss.:

SOLOMON HANFORD, being duly sworn, says that he is the attorney for the defendant named in the foregoing answer; that said answer is true to the knowledge of deponent except as to the matters 1472
therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that said defendant is not within the said county of New York in which deponent resides; and that the grounds of deponent's belief as to all matters not stated upon his knowledge are communications made to deponent by said defendant.

Sworn before me this 21st day of October, 1910.

S. HANFORD.

HENRY B. POGSON,
Notary Public,
New York County. 1473

1474 **Defendants' Exhibit J.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HUMPHREY; CLIFFORD M. WASHBURN, JOSIAH M. FISKE and ARTHUR C. SHERWOOD, individually, and as copartners composing the firm of J. M. Fiske & Co., and the firm
1475 of J. M. Fiske & Co.,

Plaintiffs,

AGAINST

JAMES R. KEENE, ALFRED H. NEWBURGER, FRANK L. NEWBURGER, SAMUEL M. NEWBURGER, LESTER M. NEWBURGER, JOHN J. HENDERSON, HORACE LOEB and JACOB F. LOEB, composing the firm of Newburger, Henderson & Loeb; CHARLES E. ORVIS, EDWIN W. ORVIS and ASHTON C. LAWRENCE, composing the firm of Orvis Brothers & Co.; GEORGE B. POST, JR., ARTHUR TURNBULL, BENSON B. SLOAN, HENRY SHAW, NEVILLE C. HIGHAM, NATHANIEL
1476 L. McCREADY and ALFRED L. DENNIS, composing the firm of Post & Flagg; and CHARLES H. JE[illegible], JR., EDWARD H. JEWETT, GEORGE W. JEWETT, RICHARD B. WHITTEMORE and ALPHEUS REHBEIN, composing the firm of Jewett Brothers; GEORGE PARMLY DAY, THATCHER M. ADAMS, JR., THOMAS LUDLOW CLARKE, CLARENCE S. DAY, THATCHER M. ADAMS and JULIAN DAY, composing the firm of Day, Adams & Co.; HARRY MARKOE, JR., ROBERT MORISON and HARRY L. BLOODGOOD, composing the firm of Markoe & Morison; ALBERT J. ELIAS and HENRY H.

ELIAS, composing the firm of A. J. Elias & Co.; EDWARD A. ROLLINS, WARREN F. ROLLINS and ADOLPH C. ROLLINS, composing the firm of Rollins & Co.; HENRY D. HOTCHKISS, as Trustee in Bankruptcy of Lathrop, Haskins & Co.; and EDWARD POPPER, ARTHUR W. POPPER, SIDNEY M. STERNBACH and JOSEPH LOEWI, composing the firm of Popper & Sternbach,
Defendants. 1477

The complaint of the plaintiffs, by Hays, Hershfield & Wolf, their attorneys, respectfully shows to this Court and alleges, upon information and belief: 1478

I—That at all of the times hereinafter mentioned Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood were copartners in business in the City of New York, under the firm name and style of 'J. M. Fiske & Co.'

II.—That at all of the times hereinafter mentioned, Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, were copartners in business in the City of New York, under the firm name and style of 'Popper & Sternbach.'

III.—That at all of the times hereinafter mentioned, Alfred H. Newburger, Frank L. Newburger, Samuel M. Newburger, Lester M. Newburger, John J. Henderson, Horace Loeb and Jacob F. Loeb, were copartners in business in the City of New York, under the firm name and style of 'Newburger, Henderson & Loeb.' 1479

IV.—That at all of the times hereinafter mentioned, Charles E. Orvis, Edwin Orvis and Ashton C. Lawrence, were copartners in business in the City of New York, under the firm name and style of 'Orvis Brothers & Co.'

1480 V.—That at all of the times hereinafter mentioned, George B. Post, Jr., Arthur Turnbull, Benson B. Sloan, Henry Shaw, Neville H. Higham and Alfred L. Dennis, were copartners with Nathaniel L. McCready in business in the City of New York, under the firm name and style of 'Post & Flagg.'

VI.—That at all of the times hereinafter mentioned, Charles H. Jewett, Jr., Edward H. Jewett, George W. Jewett, Richard B. Whittemore and Alpheus Rehbein, were copartners in business in the City of New York, under the firm name and style of 'Jewett Brothers.'

1481

VII.—That at all of the times hereinafter mentioned, George Parmly Day, Thatcher M. Adams, Jr., Thomas Ludlow Clarke and Julian Day, were copartners, with Clarence S. Day and Thatcher M. Adams as special partners, in business in the City of New York, under the firm name and style of 'Day, Adams & Co.'

VIII.—That at all of the times hereinafter mentioned, Harry Markoe, Jr., Robert Morison and Harry L. Bloodgood, were copartners in business in the City of New York, under the firm name and
1482 style of 'Markoe & Morison.'

IX.—That at all of the times hereinafter mentioned, Albert J. Elias and Henry H. Elias were copartners in business in the City of New York, under the firm name and style of 'A. J. Elias & Co.'

X.—That at all of the times hereinafter mentioned, Edward A. Rollins, Warren F. Rollins and Adolph C. Rollins, were copartners in business in the City of New York, under the firm name and style of 'Rollins & Co.'

XI.—That on March 24th, 1910, Henry S. Has- 1483
kins and Henry Leverich, individually and as co-
partners, trading as Lathrop, Haskins & Co., be-
ing composed of said individual and general part-
ners, and Fannie G. Lathrop as special partner,
were duly adjudicated bankrupts, and at the first
meeting of creditors of said bankrupts duly held on
the 18th day of April, 1910, Henry D. Hotchkiss
was duly elected Trustee in Bankruptcy of said
Henry S. Haskins, Henry Leverich and Lathrop,
Haskins & Co. and duly qualified as such, and has
ever since been acting as such Trustee of the goods,
assets and effects of the aforesaid bankrupts.

1484

XII.—That heretofore, and on the 19th day of
January, 1910, three certain creditors of said Dud-
ley P. Humphrey, Clifford M. Washburn, Josiah
F. Fiske and Arthur C. Sherwood, individually,
and as copartners composing the firm of J. M. Fiske
& Co., and of said firm of J. M. Fiske & Co., duly
filed in the office of the Clerk of the District Court
of the United States for the Southern District of
New York, an involuntary petition in bankruptcy,
in pursuance of an Act of Congress entitled, 'An
Act to Establish a Uniform System of Bankruptcy
throughout the United States,' approved July 1,
1898, and the amendments thereof and thereto,
praying that the said Dudley P. Humphrey, Clif- 1485
ford M. Washburn, Josiah M. Fiske and Arthur
C. Sherwood, individually, and as copartners afore-
said, and said firm, be adjudged bankrupts within
the purview of said Act.

XIII.—That thereafter, and on the 12th day of
March, 1910, the prayer of said petitioning credi-
tors was duly granted and an order of adjudication
was duly entered in said bankruptcy proceedings
by Hon. Learned Hand, one of the Justices of the
District Court of the United States for the South-

1486 ern District of New York, adjudging that the said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually, and as copartners composing the firm of J. M. Fiske & Co., and the said firm of J. M. Fiske & Co., were bankrupts.

XIV.—That thereafter, said proceedings in bankruptcy were duly referred to Hon. Seaman Miller, one of the Referees in Bankruptcy of the District Court of the United States for the Southern District of New York, and in pursuance of such order of reference, and on or about the 5th day
1487 of May, 1910, a first meeting of creditors of said bankrupts, was duly held as provided by said Act of Congress relating to bankruptcy, at which said meeting the plaintiffs herein was duly appointed and elected Trustees of the estate in bankruptcy of said bankrupts.

XV.—That thereafter, the appointment of plaintiffs as such Trustees, was duly approved, and the bond of said Trustees in the penal sum of $50,000 conditioned upon the faithful performance of their duties as such Trustees, was duly filed and thereafter duly approved both as to form and sufficiency,
1488 and an order approving such bond was duly filed and plaintiffs have ever since been, and still are, acting as the Trustees in bankruptcy of the said bankrupts.

XVI.—That by virtue of the order of their appointment and their qualification as such Trustees, and the provisions of the Act of Congress relating to bankruptcy, the plaintiffs herein, as trustees, have become vested with all the property of the said bankrupts of whatever kind, nature, character, or description, as of the date that the said

bankrupts were adjudicated bankrupts, to wit: 1489
March 12th, 1910, and became vested with all rights of action which creditors of said bankrupts had at the time of the said adjudication in bankruptcy.

XVII.—That heretofore, and on or about the first day of March, 1909, the bankrupts composing said firms of J. M. Fiske & Co. and Lathrop, Haskins & Co., and the defendants other than defendants Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, and defendant Hotchkiss, as Trustee as aforesaid, entered into an agreement that the said parties should and did for good and valuable consideration enter into 1490
a joint venture which should continue until the first day of September, 1909, for the purchase of 20,000 shares of the common stock of the Columbus & Hocking Coal & Iron Co. A copy of the form of said agreement is hereto attached, marked 'Exhibit A,' and is hereby made a part hereof.

XVIII.—That it was mutually understood and agreed by the said parties that the said defendant Keene should act as manager, agent and Trustee for the other members of the said joint venture in and for the purchase and sale of said stock, and the said defendant Keene agreed further that he 1491
would not, during the term of the said agreement and the continuance of the operation of the said joint venture, sell any of the stock of the Columbus & Hocking Coal & Iron Co. owned by him, or thereafter acquired by him.

XIX.—That it was further mutually understood and agreed by the said parties, that they should and did subscribe to the said undertaking for the purchase of 20,000 shares, and that their interest

1492 in the said joint venture should be in the proportion to the said subscription, viz.:

J. M. Fiske & Co.	2,000	shares.
Newburger, Henderson & Loeb	500	"
Orvis Bros. & Co.	1,000	"
Post & Flagg	1,000	"
Jewett Brothers	1,000	"
Day, Adams & Co.	3,000	"
Markoe & Morison	1,000	"
A. J. Elias & Co.	1,000	"
Lathrop, Haskins & Co.	5,000	"
Rollins & Co.	1,000	"
1493 James R. Keene	3,500	"
Total	20,000	shares.

XX.—That thereafter, and in or about the month of July, 1909, it was mutually understood and agreed by and between the parties to the said agreement that the same should be continued in force up to the first day of March, 1910, saving and excepting the following: That the defendants composing the firm of Post & Flagg, and the defendants composing the firm of Orvis Brothers & Co., were to withdraw from the said joint venture on or
1494 about the first day of September, 1909, and that they did so withdraw, and the subscription of the defendants composing the firm of Day, Adams & Co. in the said joint venture, and their interest therein, should, on the first day of September, 1909, be reduced from 3,000 to 2,000 shares, and that said interest was so reduced, and it was further mutually understood and agreed by the parties to the said agreement that the same with the said exceptions be continued in full force and effect up to the first day of March, 1910, and that the several interests of the said parties in the said joint venture

should be and were, after the first day of September, 1909, as follows: 1495

J. M. Fiske & Co.	2,000	shares.
Newburger, Henderson & Loeb	500	"
Jewett Brothers	1,000	"
Day, Adams & Co.	2,000	"
Total	17,000	shares
Markoe & Morison	1,000	"
A. J. Elias & Co.	1,000	"
Brought forward	7,500	shares
Brought forward	7,500	shares
Lathrop, Haskins & Co.	5,000	" 1496
Rollins & Co.	1,000	"
James R. Keene	3,500	"
Total	17,000	shares

XXI.—That each of the parties to said agreement agreed to hold himself in readiness to receive from the defendant Keene, as such manager, agent and Trustee, his proportionate share of all purchases and upon receipt thereof to pay for same and thereafter to deliver to defendant Keene as such manager, agent and Trustee, upon demand, the identical certificates theretofore delivered by the defendant Keene as such manager, agent and Trustee. 1497

XXII.—That on or about the 1st day of March, 1909, the said parties to the said agreement entered in and upon the execution of the said joint venture through the defendant Keene as agent, manager and Trustee, and the defendant Keene made purchases and sales of the said stock as agent and in trust for the said parties.

XXIII.—That thereafter, and prior to the commencement of this action, defendant Keene continued as agent, manager and trustee for the said

1498 parties to the said joint venture to buy and sell the said stock for the account of himself, and the said parties to the said agreement. That the entire management and control of said joint venture was vested in and exercised by the defendant Keene, and that large sums of money have come into the possession of defendant Keene as manager, agent and trustee for the said members of the said joint venture, which the defendant Keene has declined and refused to pay to his *cestuis que trust* in the proportion to which they are entitled thereto.

XXIV.—That the bankrupts composing the firm of J. M. Fiske & Co. have and the said firm of J. M.
1499 Fiske & Co. has duly performed and complied with all the terms, conditions and provisions of said agreement and of said joint venture on their part and on its part to be performed.

XXV.—That the term of the said joint venture has expired, and that no accounting has ever been rendered by the said defendant Keene, nor by any of the other parties thereto, to any of the parties hereto, of the transactions of the said joint venture. That the said defendant Keene has made large profits in and about the purchase and sale of said stock for the account of the said parties to the said agreement for which he has wholly failed to account and which he has failed to pay over.
1500

XXVI.—That the defendant Keene, with intent to defraud the other parties hereto, and in bad faith, and with the intention of making personal profit for himself, and causing a loss to the other members of the said joint venture, secretly and in violation of the provisions of the said agreement, made various purchases and sales of the said stock which resulted in losses to the other members of the said joint venture, and in large profits to himself.

XXVII.—That on or about the 18th and 19th days of January, 1910, the defendants composing the

firm of Popper & Sternbach, were brokers for said 1501
defendant Keene, and as such brokers held for the account of the said defendant Keene approximately 7,650 shares of Columbus & Hocking Coal & Iron Co. stock, the greater portion thereof being the allotment of the said stock of said defendant Keene in the said joint venture.

XXVIII.—That on or about the 18th and 19th days of January, 1910, the defendant Keene, in direct violation of his agreement with the members of the said joint venture, directed said defendants composing the firm of Popper & Sternbach, to sell approximately 6,900 shares of the said stock, realizing therefor sums of money largely in advance of 1502
the price at which said stock has since sold, and is now selling.

XXIX.—That the said defendants composing the firm of Popper & Sternbach, combined with the defendant Keene to sell the said stock, and that it was sold for the account of said defendant Keene, and that the defendants composing the firm of Popper & Sternbach, and the defendant Keene realized therefor large sums of money and that the said stock was sold at prices in advance of the prices at which the said stock has since sold and is now selling.

XXX.—That defendants composing the firm of Popper & Sternbach, contend that said sales were 1503
made for their own account, and were what is known as 'short' sales, and that in order to make good said sales, they made deliveries of the stock of the defendant Keene which was then in their custody and possession as brokers of said defendant Keene, and they further contend that any and all profits arising from the said sales were and are their own property and belong to them, and that the defendant Keene was not entitled thereto. That said defendants composing the firm of Popper & Sternbach, still hold and retain the said profits and the benefits of said transactions.

1504 XXXI.—That the defendants composing the firm of Popper & Sternbach further contend that in making deliveries of said stock, they acted by permission and authority of the defendant Keene, and that the defendant Keene acquiesced therein and thereto.

XXXII.—That the sale of said stock, and the delivery thereof, by the defendants composing the firm of Popper & Sternbach, if made for the defendant Keene, was a direct violation by the defendant Keene of his duties and obligations to the parties to the said agreement.

1505 XXXIII.—That in any event, said defendant Keene is entitled to demand and collect said profits for the benefit of the parties to the said agreement, but in violation of his said duties and obligations under the said agreement, has wrongfully acquiesced in the said contention of the defendants composing the firm of Popper & Sternbach, and has permitted, and still wrongfully permits, said defendants composing the firm of Popper & Sternbach, to retain the said profits derived from said alleged 'short' sales and the benefits of said transactions.

XXXIV.—That in any event it was the duty and obligation of the defendant Keene to adopt and to
1506 ratify said sales of stock made by the defendants composing the firm of Popper & Sternbach, and to demand and collect from said defendants on behalf of, and for the benefit of, the parties to the said agreement, the members of the joint venture aforesaid, all profits accruing and accrued to said Popper & Sternbach, by reason of said alleged 'short' sales, the profits of which amount to upwards of $300,000.

XXXV.—That the said parties to the said agreement, the members of the said joint venture, are entitled to the profits earned by the said defendant Keene and the defendants composing the firm of

Popper & Sternbach, upon said alleged 'short' sales of said stock, which plaintiffs verily believe to have been in fact sales ordered made by the defendant Keene in violation of the terms and provisions of said agreement. 1507

XXXVI.—That the parties hereto other than the defendants composing the firm of Popper & Sternbach are entitled to an accounting from the defendants composing said last mentioned firm of all profits earned by the said firm upon said alleged 'short' sales of said stock and the deliveries made pursuant thereunder, and, in any event, are entitled to have the defendants composing said firm account in this action to the defendant Keene for the benefit of all the parties to the said agreement. 1508

XXXVII.—That the said defendant Keene still has and retains in his possession, profits and property of the said joint venture and its members, and that no accounting has ever been had between any of the parties hereto of the affairs of the said joint venture.

XXXVIII.—That leave has been given this suit by order, duly obtained, of the United States District Court for the Southern District of New York.

XXXIX.—That plaintiffs have no adequate remedy at law. 1509

Wherefore plaintiffs pray:

(1) That there be an accounting decreed between the parties hereto of the affairs of the said joint venture.

(2) That the rights of the parties hereto in and to the funds of the said joint venture and the profits thereof be determined.

(3) That the defendant Keene be ordered, adjudged and decreed to account to the plaintiffs, and

1510 to the defendants herein, other than the defendants composing the firm of Popper, Sternbach & Co., for profits realized by reason of his unauthorized permission to the defendants composing the firm of Popper & Sternbach to make said alleged 'short' sales.

(4) That in addition thereto, the defendant Keene be ordered, adjudged and decreed to account to the plaintiffs and to the defendants herein, other than the defendants composing the firm of Popper & Sternbach, for any and all other sales and purchases made by him of the said stock.

(5) That the plaintiffs on their own behalf, and
1511 on behalf of the defendants other than defendant Keene and defendants composing the firm of Popper & Sternbach, have judgment against said defendant Keene for the damages sustained by reason of the violations of said agreement on the part of the said defendant Keene.

(6) That the defendants, Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, composing the firm of Popper & Sternbach, be ordered, adjudged and decreed to account to the plaintiffs, and to the other defendants herein, or to the defendant Keene for the benefit of the plaintiffs and the defendants herein, other than the defendants composing the firm of Popper & Sternbach, for any
1512 and all profits earned, or to be earned, by the said defendants composing the firm of Popper & Sternbach upon said alleged 'short' sales of stock of the Columbus & Hocking Coal & Iron Co.

And that the plaintiffs may have such other and further relief as to the Court may seem just and proper, together with the costs of this action.

HAYS, HERSHFIELD & WOLF,
Attorneys for Plaintiff,
Office & Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

City and County of New York, ss: 1513

IRVING L. ERNST, being duly sworn, says that he is one of the plaintiffs in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

IRVING L. ERNST.

Sworn to before me this 28 day of July, 1910.

ELI M. COHEN,
Notary Public,
New York County.

1514

EXHIBIT A.

'The undersigned, being desirious of purchasing at least 20,000 shares of the common stock of the Columbus & Hocking Coal & Iron Company, do hereby agree to purchase the same, or so much thereof as in the opinion of the hereinafter appointed managers may be deemed advisable, in the proportion set opposite the respective names of said subscribers and we hereby appoint James R. Keene our agent and manager to make such purchases at such time or times before the first day of September, 1909, unless sooner desolved by the majority of 1515
the stock subscribed, in such manner and amounts and at such prices as in his judgment shall be to our mutual advantage.

Each one signing this agreement to pay on demand for so much of said purchases as his subscription (as near as may be practicable) bears to the whole amount subscribed, as such agent or manager may require. Also to return the same amount of certificates or part thereof at any time when called for before the first day of September, 1909, on receiving from the manager the amount paid therefor,

with interest at five per cent. per annum. We further agree on any call from said manager to deliver to said manager the same certificates theretofore delivered to us by him.

Further, we hereby authorize the said agent and manager to sell at his discretion the whole or any part of the certificates purchased and again buy, so buying and selling at his discretion.

It is further agreed that any profits or losses incurred through the purchase and sale of said certificates shall be divided in proportion to the amount subscribed for by each one signing this agreement. No one signing this agreement shall have the right to call for a statement of accounts growing out of transactions herein authorized, except on the request in writing of 60 per cent. in amount of certificates subscribed.

We hereby agree to reimburse the said agent and manager for any commissions paid by him to such brokers as he may deem advisable to employ in the execution of the herein authorized purchases and sales and such other expenses as he may incur and which to him may seem for the best interests of all parties to this agreement.

This agreement is not to be binding on the undersigned until certificates for 20,000 shares are subscribed and thereupon this agreement shall become operative. Subscriptions beyond this amount may be received by the agent and manager up to 20,000 shares.

The original hereof shall be signed by the manager. Counterparts hereof may be signed by subscribers and all shall be taken together and deemed to be one original instrument, and upon the agreement becoming operative the manager shall notify the subscribers.

In Witness Whereof, the parties have signed this agreement as of March 1st, 1909.

Manager.'

Defendants' Exhibit K. 1519

N. Y. SUPREME COURT.

IRVING L. ERNST and others as Trustees, Etc., of J. M. Fiske & Co.

AGAINST

JAMES R. KEENE, and others

Action No. II.

1520

The separate answer of James R. Keene one of the defendants to the complaint of the plaintiffs in the above entitled action.

UPON INFORMATION AND BELIEF.

FIRST.—The said defendant answering the said complaint denies that he has any knowledge or information sufficient to form a belief of the allegations contained in the paragraphs of said complaint designated I to XVI, both inclusive, XIX, XXXVIII and XXXIX.

The said defendant admits the allegations contained in the paragraphs of said complaint desig- 1521
nated XVII, XXX and XXXI.

The said defendant denies the allegations contained in the paragraphs of said complaint designated XVIII to XXIX, both inclusive, and XXXII to XXXVII, both inclusive. He admits and alleges however:

That said plaintiffs represent those constituting the late firm of J. M. Fiske & Company;

That the written agreement mentioned in the complaint was subscribed by the parties and in the amounts stated in paragraph XIX;

1522 That the term of the arrangement covered by the said agreement was in July, 1909, extended to March 1, 1910, with the changes of parties in interest stated in paragraph XX.

That not only was there intentionally omitted from the said agreement any provision limiting the right of the subscribers to deal in the said stock as they should see fit, but it was expressly understood and agreed by the subscribers that this defendant and every other subscriber should be free to sell any stock he might own, and conduct such other operations in the said stock for his own account as he should see fit, save and except that the certificates representing distributions of pool stock should
1523 be held subject to call;

That in the relation created by the said written agreement and the said understanding and agreement as to the right of this defendant and the other subscribers to conduct individual operations in the said stock and not otherwise this defendant proceeded to acquire and distribute stock for said pool and to resell the same from time to time; and that incidentally this defendant and the firm of Lathrop, Haskins & Co. together for their joint account and separately for their individual account, conducted operations in said stock as they had a perfect right to do, and as was done by the other subscribers to the pooling arrangement; that this proceeded until
1524 about the 23rd day of April 1909 at which time all of the pool stock previously purchased had been sold and all of the 7,000 shares of stock held by this defendant prior to the making of said agreement had also been sold with the exception of 800 shares; that the pool operations so conducted by this defendant had netted to the pool members on their subscriptions profits aggregating over $250,000 which had been in no way whatever diminished or in any way affected otherwise than favorably by the individual operations of this defendant including the sale of 6,200 shares of his said original holdings of 7,000 shares of said stock;

That prior to and after the said 23rd day of April, 1525
1909, not only this defendant and the said firm of Lathrop, Haskins & Co., but as this defendant is informed and believes, the said firm of J. M. Fiske & Co. and every one of the other subscribers to the said pool agreement, had alone and jointly with other persons conducted individual operations in the said stock, some of the said subscribers, including said Lathrop, Haskins & Co., and J. M. Fiske & Co., having organized unknown to this defendant until long afterwards, various independent associations or pools for speculating in said stock;

That on or about the said 23rd day of April, 1909, having disposed of all of the pool stock previously purchased and all of his said individual holdings of 1526
7,000 shares except 800 shares, with a resultant profit to the pool members of over $250,000 as aforesaid, this defendant announced his judgment of the wisdom of either abandoning or at least suspending further pool operations believing that the market price of the stock which had then reached about $66 per share would probably recede and that the stock which had been sold could be reacquired later if desired at a lower price; that thereupon the said pool was sold out and dissolved by the majority of the stock subscribed in such manner and amounts and at such prices as in this defendant's judgment was to the mutual advantage of the parties to said agreement;

That the term of the arrangement covered by the 1527
said agreement has expired.

The said defendant further answering denies each and every allegation in the said complaint contained not hereinbefore specifically admitted or denied.

SECOND.—For a further, separate and distinct complete defense to the entire pretended cause of action alleged in the said complaint, the said defendant relying upon the allegations, admissions and specific denials in the preceding defense contained, in the

same manner as if the same were here repeated at length, further answering, alleges:

That by the written agreement mentioned in the complaint it was expressly provided that "No one signing this agreement shall have the right to call for a statement of accounts growing out of transactions herein authorized except on the request in writing of 60 per cent. in amount of certificates subscribed," and that no such request as that required by the said provision of said agreement has been made.

THIRD.—For a further separate and distinct complete defense to the entire pretended cause of action alleged in the said complaint, and as a counterclaim thereto, the said defendant relying upon the allegations, admissions and specific denials in the preceding defenses contained, in the same manner as if the same were here repeated at length, further answering alleges:—

That the said firm of J. M. Fiske & Co. broke the agreement hereinabove admitted to have been made in the following particulars, that is to say, by recklessly entering upon and prosecuting speculations in said stock of a magnitude out of all proportion to their financial resources; and by conducting as brokers for and promoting in the conducting by other brokers for irresponsible individuals of important operations in said stock on slender margins and in some cases without margins, whereby the parties to said pooling arrangement, including this defendant, were placed in a position of grave peril through the inability of said J. M. Fiske & Co., and their customers and associates outside of said pooling arrangement to sustain the effect of any important recession in the market price of said stock; all of which wrongful acts and omissions tended directly toward precipitating and on the 19th day of January, 1910, did precipitate a disastrous panic and the fall of the market price of said stock from about $88 per share

to about $15 per share, to the damage of this de- 1531
fendant in the sum of $250,000.

SOLOMON HANFORD,
41 Wall St. (Manhattan),
New York City,
Attorney for said Defendant.

County of New York, ss:

SOLOMON HANFORD, being duly sworn, says that he is the attorney for the defendant named in the foregoing answer; that said answer is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that said defendant is not within the said 1532
County of New York in which deponent resides; and that the grounds of deponent's belief as to all matters not stated upon his knowledge are communications made to deponent by said defendant.

S. HANFORD.

Sworn to before me this 22nd day of October, 1910.

HENRY B. POGSON,
Notary Public,
New York County.

1533

1534 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST and others, as Trustees of Dudley P. Humphrey *et al.*,
Plaintiffs, Appellees,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY
1535 OF NEW YORK,
Defendant, Appellant.

The within, embraced within the foregoing pages numbered from 1 to 511, inclusive, and contained in two volumes, are true copies of the testimony, exhibits, pleadings, court orders, &c., composing the entire Record on Appeal herein.

Dated, New York, March 30, 1912.

HAYS, HERSHFIELD & WOLF,
Solicitors for Plaintiffs, Appellees.

JOLINE, LARKIN & RATHBONE,
1536 Solicitors for Defendant, Appellant.

DISTRICT COURT OF THE UNITED STATES, 1537

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST and others, as Trustees of Dudley P. Humphrey *et al*,
Plaintiffs, Appellees,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant, Appellant. 1538

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, THOMAS ALEXANDER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of such portions of the record of the District Court in the above entitled cause as it is stipulated between counsel shall constitute the entire Record on Appeal herein.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereto affixed at the City of 1539
New York, in the Southern District of New York, this 30th day of March, in the year of our Lord One thousand nine hundred and twelve, and of the Independence of the said United States the One hundred and thirty-sixth

THOMAS ALEXANDER,
Clerk.

[SEAL.]

United States Circuit Court of Appeals for the Second Circuit, October Term, 1912.

Argued November 14, 1912; Decided December 9, 1912.

NOVEMBER 18, 1912.

No. 55-127.

IRVING L. ERNST et al., as Trustees, etc., Complainants-Appellees,
vs.
THE MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant-Appellant.

Before Lacombe, Coxe, and Ward, Circuit Judges.

HENRY D. HOTCHKISS, as Trustee, etc., Complainant-Appellant,
vs.
THE NATIONAL CITY BANK OF NEW YORK, Defendant-Appellant.

Before Lacombe, Ward, and Noyes, Circuit Judges.

Appeals from the District Court of the United States for the Southern District of New York.

WARD, *Circuit Judge:*

These cases are alike in respect to the main question involved, which is said to be of great importance to the business of stock brokers in New York City and may be disposed of together as to it. Certain features in which they differ will be considered separately.

January 19, 1910, between twelve and one o'clock, the stock broking firms of J. M. Fiske & Company and Lathrop, Haskins & Company failed, as the result of the collapse of a pool or pools in the stock of the Columbus & Hocking Valley Coal & Iron Company.

At the beginning of banking hours on that day Fiske & Company had arranged for a day or clearance loan of $400,000 from the Mechanics, now the Mechanics & Metals National Bank, and Lathrop, Haskins & Company had arranged for one of $500,000 from the National City Bank. The banks becoming uneasy about the financial condition of the brokers as the day progressed, demanded security for their accounts and obtained from each a large quantity of collaterals. Between twelve and one o'clock the firms notified the Stock Exchange that they were unable to meet their engagements and subsequently each was adjudicated a bankrupt. The trustee of each estate brought a plenary action in equity for recovery of the securities or their value as a preference voidable by him under Sec. 60 of the Bankruptcy Act and also in the case of Fiske & Company for some $54,000 in cash deposited by them on the morning of the 19th in their account with the bank. The proceedings were referred to a Special Master, who took testimony and reported tha

each transaction was a voidable preference and directed the banks to account for the securities and cash to the trustees in bankruptcy of the failed firms. This report was confirmed by the District Court and the banks have taken the appeals which are now to be disposed of.

Fiske & Company had been dealing with the Mechanics National Bank since November 8, 1901, under the following written contract:

"Know all men by these presents, That the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by the Mechanics' National Bank of the City of New York, hereby agree with the said Bank that whenever the undersigned shall become or remain directly or contingently, indebted to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee, or in any other matter whatsoever, or upon any other claim, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which said indebtedness may arise against the undersigned, or his, or their executors, administrators or assigns, namely:

1. All securities deposited by the undersigned with said Bank, as collateral to any such loan or indebtedness of the undersigned to said Bank shall also be held by said Bank as security for any other liability of the undersigned to said Bank, whether then existing or hereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description left with said Bank for safe keeping or otherwise, or coming to the hands of said Bank in any way, as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral securities to an amount satisfactory to said Bank; and upon the failure of the undersigned at all times to keep a margin of securities with said Bank for such liabilities of the undersigned satisfactory to said Bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall at the option of said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3. Upon failure of the undersigned either to pay any indebtedness to said Bank when becoming or made due, or to keep up the margin of collateral securities above provided for, then and in either event said Bank may immediately without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or Broker's Board or otherwise and apply the proceeds of such sale as far as needed toward the payment of any or all such liabilities together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such

application. If any such sale be at Broker's Board or at public auction, said Bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said Bank may also apply toward the payment of the said liabilities all balances of any deposit account of the undersigned with said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future as well as to existing transactions between the undersigned and said Bank."

On January 19th they applied for a day loan (which was granted), as follows:

"NEW YORK, *January* 19, 1910.

Mechanics National Bank, New York City:

Please loan us today $400,000. Crediting this amount to our account, and oblige.

J. M. FISKE & COMPANY."

On the same day Lathrop, Haskins & Company applied to the National City Bank for a day loan of $500,000 and signed two notes differing only in amount, in the following form:

"$300,000. NEW YORK CITY, *January* 19, 1910.

On demand for value received we promise to pay to The National City Bank of New York, or order, Three hundred thousand ($300,000) Dollars, hereby agreeing that said Bank shall have a lien upon all property of the undersigned now or hereafter in its possession or under its control, as security for any indebtedness of the undersigned now existing or hereafter contracted, with the right at any time to demand additional security, and with the right, upon default in payment, to sell, without advertisement or notice to the undersigned, any or all of the securities or property so held, at public expense or private sale, or to otherwise dispose of the same in the discretion of any of the officers of said Bank, applying the proceeds upon the said indebtedness together with interest and expenses, legal or otherwise, the undersigned to be liable for any deficiency.

LATHROP, HASKINS & CO."

The proofs show that in New York City contracts of brokers to deliver stock sold and to pay for stocks purchased must be carried out the next day and that credit from banks is absolutely necessary to enable them to release the securities they have sold, which are generally pledged in banks or trust companies, and with their proceeds to pay for the securities they have bought. To enable them to clear these transactions the banks at 10 A. M. of each business day extend a credit which must be repaid by 3 P. M. of the same day. These loans are made from day to day and are called day or clearance loans, no interest being charged upon them.

We have no doubt that both the firms in question were insolvent when they delivered the securities and deposited the cash and that the banks had reasonable cause to believe so. But it is not every

transfer by an insolvent within the four months period that is voidable by the trustee. It must be on account of a pre-existing debt. When one gives an insolvent present value for a transfer of property or when he makes an exchange of property, there is no preference. Authorities upon this subject may be found in Collier on Bankruptcy, 8th Edition, page 664, and Loveland on Bankruptcy, 4th Edition, Sec. 512.

No doubt a contract might be made between a bank and a broker stipulating that the day loan should be used specifically for the release of the broker's pledged securities and that their proceeds or the proceeds of substituted securities should be immediately deposited in the bank in repayment of the loan. As it would not be possible for the bank itself to send around checks to the various trust companies and actually take up the pledged securities belonging to its stock broking depositors and deliver them to purchasers against payment of the price, the agreement of the broker to do this would make him agent or trustee of the bank and would seem to be quite sufficient to bring the transaction within the cases held not to constitute preferences. The loan and repayment the same day should be regarded as one transaction, the fact that they were not literally contemporaneous being a necessary result of the nature of the business. It would not be possible to act like a farmer, who holds the cow's tail in one hand until he gets payment for her in the other. We think it would make no difference under such a contract, that the bank did not know what specific securities were to be released or that it permitted the broker to deliver the same to purchasers. See on the subject generally, Sexton vs. Kessler, 172 F. R., 535; 225 U. S., 90; Mills vs. Virginia-Carolina Lumber Co., 164 F. R., 168. A particularly apposite case is Dessel vs. North State Lumber Co., 119 F. R., 531.

In these cases the banks seek to escape by claiming that they had an equitable lien upon the securities subsequently delivered and cash deposited by the brokers and that they were receiving only their own property. Each of them, however, admits that it made the day loan under the written agreements above mentioned. Each contained provisions as to securities in the possession, but none as to securities not in the possession of the bank. Those in question here were not in the possession of the banks. Moreover, neither the banks nor the brokers when the transfers were made spoke of securities specifically covered by their loans. The banks simply demanded security generally and took whatever they could get. The conduct of the parties at the time is inconsistent with any claims to specific securities or their proceeds. We see no ground for claiming an equitable lien under these contracts alone.

The banks, however, also allege a usage of the business which requires the clearance loan to be so applied which they seek to annex to the written contracts. It is objected that such a usage cannot be proved, because it contradicts or adds to the written contract. We do not think the usage contradicts the contracts because they contemplated collateral delivered against loans, whereas these day or clearance loans are never made against collateral. Proof of such a usage would only be as to the way in which the day loans were to be applied

and would be entirely consistent with the written contracts. It may very well be that if the broker failed to carry out the contract, equity would not aid the bank to the prejudice of creditors generally, but this is no ground for saying that if the contract had been carried out, equity would intervene to disturb it.

The following extract from a stipulation made in the case is the best statement made in support of the banks' claim:

"It is further stipulated that if members of the stock exchange houses to which the said banks made the said so-called day or clearance loans were called as witnesses herein, each of the said brokers called would testify respectively that the amount of the so-called day or clearance loan was credited to his general account with the bank; that in this general account there was also credited the balance he had on deposit with the bank at the opening of the day.

That all of the moneys received by him in the course of his business throughout the day, from whatever source, was deposited with the bank making the so-called day or clearance loan, and credited to his general account as aforesaid.

That in the course of the day he drew and had certified checks against the said account which were used to pay off demand or time loans and obtain the release of securities held as collateral thereto, or to take up stocks, bonds or other securities which he had agreed to purchase, or to borrow stock for delivery, or for the substitution of securities, but it was expected and understood that no portion of the proceeds of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his business and to meet the general obligations thereof.

That the securities he received as aforesaid were not kept separate but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans.

That he kept no separate account of the moneys received on the deliveries of stock acquired by him as before mentioned, but that all the moneys received by him, in the course of the day, from whatever source, were deposited by him to the credit of his said account with the bank making the said loan.

That the said day or clearance loans were paid off by his check or checks drawn to the order of the bank, at the close of the day. That during the day, as soon as checks were received by him from the sale of securities cleared by the proceeds of the day or clearance loan, or as soon as moneys were received by the broker from new loans made with the securities cleared by the day or clearance loan, the checks or moneys resulting therefrom were promptly deposited with the bank during the day as soon as or within a reasonable time after the same were received; and that in order to pay off such day or clearance loans, if he had not sufficient funds on deposit with said bank which made such day or clearance loans, it would be necessary for

him to obtain a demand or time loan at the Stock Exchange for and on behalf of the identical bank making the day or clearance loan as aforesaid. The collateral security used for such demand or time loan might be any or all securities in his (the broker's) possession from whatever source and however those securities were acquired by him; or he, the broker, might, if occasion required, apply directly to the bank making the said day or clearance loan for a new demand loan on such securities in his possession as aforesaid, as would be acceptable to the bank, in order to discharge his indebtedness under the day or clearance loan at the close of the day. The amount of such loan would be credited to his general account with the bank and the so-called day or clearance loan would be paid at the close of the day by check drawn against this account."

We do not think that the usage alleged was proved. It was abundantly established that the brokers do repay banks for the clearance loan on the same day and generally with the proceeds of the released securities or of substantial securities and that it is understood or expected that this shall be done. This, however, only shows the way in which the business is done. It could hardly be done and certainly could not be continued in any other way. Such a course of business does not establish that the brokers have agreed to do these things or are bound by usage to do them or that the banks are entitled to the proceeds of the released securities. Indeed, we understand that the question as to the rights and obligations of the parties if the broker fails to repay or secure the clearance loan on the day it was made is raised for the first time in the cases now under consideration. Therefore, we agree with the conclusion of the Special Master and the court below on the main question involved in both cases.

There are two particulars in which the cases differ from each other, now to be considered separately.

In the case of the National City Bank, the Trustee claims that he is entitled to the value of the securities at the time they were transferred, they having in the meantime depreciated considerably. The Bankruptcy Act, Sec. 60 (*b*) does provide that in the case of a voidable preference the trustee "may recover the property or its value." The Special Master and the court below, however, held and we think rightly, that the Trustee had left the disposition of the securities to the absolute discretion of the bank, their proceeds, if sold, to stand in their place. Under such circumstances, it would be inequitable to hold the bank liable for the depreciation. All the Trustee is entitled to is a return of the securities and an accounting as to any dividends or interest collected in the meantime.

In the case of the Mechanics National Bank, a deposit was made by Fiske & Company on the morning of January 19, which the Trustee claims should be returned with interest as a voidable preference. This for the reason that the bank had ordered no more certifications to be made before the deposit was received, which it is contended was a closing of the account, so that the relation of debtor and creditor between the firm and the bank did not exist as to this fund. The Special Master and the court below held that the deposit was made after the bank had knowledge of the broker's insolvency, or at least

was put on inquiry, so that the deposit was a voidable preference, just as much as the delivery of the securities. In this view we concur. The decrees are affirmed.

L. H. Freedman for the Appellant.
D. P. Hays for the Appellees.
John A. Garver for the Defendant.
A. I. Elkus for the Complainant.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 19th Day of December, One Thousand Nine Hundred and Twelve.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred C. Coxe,
Hon. Henry G. Ward,
Circuit Judges.

Irving L. Ernst et al., as Trustees, etc., Complainants-Appellees,
vs.
Mechanics' and Metals National Bank of the City of New York, Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.
A. C. C.

Endorsed: United States Circuit Court of Appeals, Second Circuit. I. L. Ernst vs. Mechanics & Metals Bank. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 23, 1912. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

IRVING L. ERNST, LINDSAY RUSSELL, and HARFORD T. MARSHALL, as Trustees in Bankruptcy of Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske, and Arthur C. Sherwood, Individually and as Copartners Composing the Firm of J. M. Fiske & Company, and of the Firm of J. M. Fiske & Company, Bankrupts, Complainants-Appellees,

against

THE MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant-Appellant.

Petition for Appeal.

The above named defendant-appellant, The Mechanics' and Metals National Bank of the City of New York, respectfully shows that a final decree has been rendered in the above entitled cause on the 23rd day of December, 1912, affirming the final decree herein of the District Court of the United States for the Southern District of New York made and entered on or about the 9th day of January, 1912, upon the merits, with costs, and the defendant-appellant conceiving itself aggrieved thereby, and the cause being one in which the United States Circuit Courtof Appeals for the Second Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on Appeal, the matter in controversy exceeding $100,000 besides costs.

Wherefore the said defendant-appellant appeals from the said decree of the 23rd day of December, 1912, to the Supreme Court of the United States, and prays that this appeal may be allowed and a citation granted and directed to the above named complainants-appellees, Irving L. Ernst, Lindsay Russell and Harford T. Marshall as Trustees in Bankruptcy of Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as copartners composing the firm of J. M. Fiske & Company, and of the firm of J. M. Fiske & Company, Bankrupts, commanding them, and each of them, to appear before the Supreme Court of the United States, and to do and receive justice in the premises, and that a transcript of the record, proceedings and papers upon which such judgment was entered may be duly authenticated and sent to the Supreme Court of the United States.

Dated, New York, January 24th 1913.

ADRIAN H. LARKIN,
Solicitor for The Mechanics' and Metals National Bank of the City of New York, Defendant-Appellant.

Office & Post Office Address, No. 54 Wall Street, Manhattan, New York City.

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be, and it hereby is allowed as prayed this 24th day of January, 1913.

H. G. WARD, *U. S. C. J.*

(Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Irving L. Ernst et al., Complainants-Appellees, vs. The Mechanics' and Metals National Bank of the City of New York, Defendant-Appellant. Petition for Appeal. Adrian H. Larkin, Solicitor for The Mechanics' and Metals National Bank of the City of New York, 54 Wall Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals, Second Circuit.

IRVING L. ERNST, LINDSAY RUSSELL, and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. Fiske et al., and J. M. Fiske & Company, Bankrupts, Complainants-Appellees,

against

THE MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant-Appellant.

Assignment of Errors.

The Mechanics' and Metals National Bank of the City of New York as aforesaid, having appealed to the Supreme Court of the United States from the final decree of the United States Circuit Court of Appeals, Second Judicial Circuit, dated the 19th day of December, 1912, and entered in the office of the Clerk of the United States Circuit Court of Appeals, Second Judicial Circuit, on the 23rd day of December, 1912, affirming the decree of the District Court of the United States for the Southern District of New York dated the 8th day of January, 1912, and entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 9th day of January, 1912, granting the prayer of the complainants' bill upon the merits and costs, now makes and files the following assignment of errors herein:

1. The said Court erred in affirming said decree of the District Court of the United States.

2. The said Court erred in awarding costs against the defendant-appellant upon affirming said decree.

3. The said Court erred in remanding the case to the District Court of the United States directing that the decree of said District Court be affirmed with costs.

4. The said Court erred in not dismissing the bill of complaint.

5. The said Court erred in adjudging and decreeing that the transfers and deliveries of the stocks, bonds, securities and moneys referred to in the complaint herein by the bankrupts J. M. Fiske & Company, to the defendant-appellant, The Mechanics' and Metals National Bank of the City of New York, on January 19th, 1910, were and are unlawful performances within the meaning of the Bankruptcy Act of 1898 and the amendments thereto, and are void, and setting aside the said transfers and deliveries.

6. The said Court erred in not holding and deciding that there was no competent proof as to the financial status of the said firm of

J. M. Fiske & Company, nor of the individual members thereof, at the time of the delivery of said securities to Mr. Roe, the representative of the defendant-appellant, by Mr. Sherwood, a member of the said firm of J. M. Fiske & Company, and the deposit of certain items of cash by said firm of J. M. Fiske & Company with said defendant-appellant, and that the aggregate amount of the property of said firm, exclusive of any property which it had conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay creditors was of a fair valuation sufficient in amount to pay its debts.

7. The said Court erred in holding and deciding that the books of J. M. Fiske & Company were admissible as competent material and relevant evidence of proof of insolvency of the said firm.

8. The said Court erred in holding and deciding that said books had been properly proved.

9. The said Court erred in holding and deciding that when the defendant-appellant, received the cash and securities on the 19th day of January, 1910 it had reasonable cause to believe that the said firm of J. M. Fiske & Company and the individual members thereof were insolvent.

10. The said Court erred in not holding and deciding that at the time of the receipt of said securities and cash the defendant-appellant had not reasonable cause to believe that the said firm of J. M. Fiske & Company and the individual members thereof were insolvent.

11. The said Court erred in holding and deciding that the information received by the defendant-appellant through Mr. Roe on the 19th day of January, 1910, was sufficient in law to have led an ordinary, prudent business man to an inquiry of the firm of J. M. Fiske & Company's financial condition, and that said inquiry would have revealed the insolvent condition of said firm.

12. The said Court erred in holding and deciding that the information which Mr. Roe received was not sufficient in law to lead an ordinary prudent business man to an inquiry of the firm of J. M. Fiske & Company's financial condition.

13. The said Court erred in holding and deciding that under the circumstances revealed by the record Mr. Roe, as agent of the defendant-appellant, was bound to make inquiries of Mr. Sherwood or Mr. Humphreys when he was at the office of J. M. Fiske & Company as to the financial condition of said firm, and that had he made such inquiries he would undoubtedly have been informed as to its financial condition.

14. That said Court erred in not holding and deciding that there was no duty upon Mr. Roe under the circumstances to make inquiries of Messrs. Sherwood or Humphreys as to the financial condition of the firm of J. M. Fiske & Company.

15. The said Court erred in holding and deciding that the defendant-appellant must be deemed to have such knowledge as Mr. Roe would have obtained had he made inquiry as to the financial condition of J. M. Fiske & Company.

16. The said Court erred in not holding and deciding that the de-

fendant-appellant must not be deemed to have such knowledge sufficient to fasten upon it a reasonable cause to believe that said firm of J. M. Fiske & Company was in fact bankrupt at the time of the delivery by it of said property on the 19th day of January, 1910, and in not finding that the record did not reveal that had such inquiry been made Mr. Roe would have, as a matter of fact, obtained information as to the true financial status of said firm of J. M. Fiske & Company.

17. The said Court erred in holding and deciding that the defendant-appellant must have had knowledge that the firm of J. M. Fiske & Company was insolvent, and having such knowledge, to have had reasonable cause to believe that the fact of the transfer would have been to enable it to obtain a greater percentage of its debt than any other creditor of the same class.

18. The said Court erred in holding and deciding that the cancelling of the day loan and Mr. Roe's instructions to the clerks of the defendant-appellant not to pay or certify any more checks for the account of J. M. Fiske & Company, and the closing and balancing of said account of said firm with said bank, was sufficient to cause Mr. Roe to believe that the firm was unable to pay its debts.

19. The said Court erred in not finding and deciding that said steps and each of them were merely precautionary and pursuant to the terms of an agreement existing between the parties, and that there was no ground to cause Mr. Roe to believe that said firm of J. M. Fiske & Company and the individual members thereof were, as a matter of fact, unable to pay their debts.

20. The said Court erred in holding that the effect of the said transfer and securities to the defendant-appellant enabled it to maintain a greater percentage of its debt than other creditors of the same class.

21. The said Court erred in failing to hold that said defendant-appellant had not reasonable cause to believe that it was intended by said firm in the delivery of said securities and cash and the payment of said cash to give to said defendant-appellant a preference whereby it would be enabled to obtain a greater percentage of its debt than any other creditor of the same class.

22. The said Court erred in not holding and deciding that the delivery of the physical possession of the property and securities received by the defendant-appellant on the 19th day of January, 1910 from the bankrupts J. M. Fiske & Company was in accordance with a valid contract made at a time prior to four months before the filing of the petition in bankruptcy against the bankrupts, and in not finding that said contract was valid and effective against the complainants-appellees.

23. The said Court erred in not holding and deciding that the defendant-appellant had an equitable lien or claim or right on or in the property, cash and securities mentioned in the bill of complaint and received by it on the 19th day of January, 1910 which was valid against the complainants-appellees, as Trustees in bankruptcy.

24. The said Court erred in holding and deciding that the bankrupts did not make any particular property or fund security for the

debt or obligation by virtue of which the defendant-appellant seeks to hold the property and securities received by it on the 19th day of January, 1910, and in holding and decreeing that the bankrupts did not agree to keep on hand particular specified property or the proceeds thereof as security for the debt due from them to the defendant-appellant.

25. The said Court erred in holding and deciding that the agreement and contract between the bankrupts and the defendant-appellant and the course of conduct of the parties thereunder and the custom of the financial district where said contract was made and performed, as appears in the record, did not create an equitable claim or lien or right in favor of the defendant-appellant on the property and securities received by it on the 19th day of January, 1910, valid and effective against the complainants-appellees as Trustees in bankruptcy as aforesaid.

26. The said Court erred in not holding and deciding that there was prior to the four months next preceding the filing of the petition in bankruptcy against said firm of J. M. Fiske & Company and the members thereof, a certain bona fide agreement by and between the said bankrupts and the defendant-appellant whereby the said bankrupts agreed to hold specific property or the proceeds thereof for the benefit of the said defendant-appellant, which said agreement amounted to an equitable lien, claim or right valid against the complainants-appellees, as Trustees in bankruptcy.

27. The said Court erred in not holding and deciding that there was an express agreement between J. M. Fiske & Company, the bankrupts, and the defendant-appellant made prior to four months next preceding the filing of the petition in bankruptcy against the said bankrupts, pursuant to which J. M. Fiske & Company agreed to make the particular property received by said firm on the 19th day of January, 1910 a security for the debt or other obligation of said firm to the defendant-appellant enforceable against the complainants-appellees as Trustees in bankruptcy of said bankrupts.

28. The said Court erred in not holding and deciding that the defendant-appellant had a right, title and interest in and to the property and securities received by it from J. M. Fiske & Company on the 19th day of January, 1910, and existing before the receipt of said property on said day not in contravention of the bankruptcy act nor destroyed by the adjudication in bankruptcy of said bankrupts and valid as against the complainants-appellees, as Trustees in bankruptcy.

29. The said Court erred in holding and deciding that the agreement between the said bankrupts and the defendant-appellant as shown in the record in relation to the property and securities received by the defendant-appellant on the 19th day of January, 1910, did not confer upon said defendant-appellant the right to reduce the said property and securities to possession.

30. The said Court erred in holding and deciding that equity will not enforce as against the complainants-appellees, as Trustees in bankruptcy, the agreement disclosed by the record between the bankrupts aforesaid and the defendant-appellant.

31. The said Court erred in not holding and deciding that the legal or equitable title in the securities or property received by the defendant-appellant on the 19th day of January, 1910 passed to the said defendant-appellant prior to the filing of the petition in bankruptcy against the said bankrupts, and that there is no express law invalidating the transfer on the facts disclosed in the record.

32. The said Court erred in holding and deciding that the common stock of the Columbus & Hocking Coal & Iron Company on the 19th day of January, 1910 did not have any substantial value, and that its price on the New York Stock Exchange was maintained by a pool organized to invalidate it.

33. The said Court erred in not holding and deciding that the defendant-appellant had no knowledge through which it would have had reasonable cause to believe that said firm was insolvent and that by receiving such property it would have reasonable cause to believe that the effect of the transfer would have been to enable it to obtain a greater percentage of its debt than any other creditor of the same class.

34. That said Court erred in holding and deciding that the defendant-appellant is among the general class of creditors of the bankrupts whose claims aggregate upwards of a million dollars.

35. The said Court erred in holding and deciding that the defendant-appellant is not a general creditor and that there is no other creditor of the said firm of J. M. Fiske & Company, or of the partners thereof, of the same class as the defendant-appellant.

36. The said Court erred in holding and deciding that a condition did not exist out of which any custom or usage could arise.

37. The said Court erred in not holding and deciding that the record revealed the existence of condition out of which a custom or usage could arise, and that the facts were that the custom or usage as set forth in the record did in fact exist.

38. The said Court erred in holding and deciding that considering the purposes for which "day loans" are made by banks in the financial district of the City of New York to Stock Exchange Brokers in the City of New York no such custom could exist.

39. The said Court erred in not holding and deciding that the facts as shown reveal that said "day loans" made by and between banks and stock exchange brokers in the City of New York, N. Y. were governed by said custom as shown by *by* the record and that the same as a matter of fact did exist.

40. The said Court erred in holding and deciding that the result of the day's transactions leads to the payment of the day loans and not to their security, and such is the understanding and intent of both borrower and lender.

41. The said Court erred in not holding and deciding that the intent of both borrower and lender is to secure said day loans at the time that they are made, and that the same shall remain secured at all times until paid, and that the lender shall from the time that the loan is made have a lien or claim upon or interest in said funds and the avails thereof, no matter what form they shall take, until the payment and discharge of said "day loans."

42. The said Court ered in holding and deciding that no custom or usage was shown to exist between banks in the City of New York and Stock Exchange brokers in reference to the method of paying the unpaid balance of said "day loans."

43. The said Court erred in holding and deciding that a custom or usage does exist between banks in the City of New York, N. Y. and Stock Exchange brokers in reference to the method of paying the unpaid balance of said "day loans."

44. The said Court erred in holding and deciding that the defendant-appellant had no lien or right upon or claim in or to the property and securities in question, and that at the time of the delivery thereof to its agents it had no pre-existing right to or lien or right thereon or claim therein or thereto.

45. The said Court erred in holding and deciding that the defendant-appellant is not entitled to retain the sum of $54,048.08, constituting the deposit made by the said firm of J. M. Fiske & Company with the defendant-appellant on the 19th day of January, 1910.

46. The said Court erred in not holding and deciding that the defendant-appellant was entitled to retain the sum of $54,048.08, constituting the deposit made with it by the said firm of J. M. Fiske & Company, in the course of business on the 19th day of January, 1910.

47. The said Court erred in holding and deciding that the defendant-appellant never received or held the said sum of $54,048.08 as a deposit or received or held the same as a bank or banker, and that said firm of J. M. Fiske & Company never had a right to draw against the said sum.

48. The said Court erred in not holding and deciding that the said defendant-appellant did not receive the said sum of $54,048.08 as a bank deposit, and that the right of said firm of J. M. Fiske & Company to draw against the same was absolute until the time of the failure of said firm subsequent to the making of said deposit and the application of the same to the indebtedness of J. M. Fiske & Company pursuant to its agreement with the defendant-appellant.

49. The said Court erred in holding and deciding that the deposit of $54,048.08 was made when the said firm of J. M. Fiske & Company and the individual members thereof were insolvent, and was applied by the defendant-appellant to the payment of the indebtedness to it by the said firm of J. M. Fiske & Company when said defendant-appellant had reasonable cause to believe that it was intended by said firm in making said deposit to give to said defendant-appellant a preference whereby it would be enabled to obtain a greater percentage of its debt than any other creditor of the same class.

50. The said Court erred in not holding and deciding that said firm of J. M. Fiske & Company was solvent and that said sum of $54,048.08 was received by said defendant-appellant as a deposit and was not applied by said defendant-appellant to the payment of said indebtedness of said firm of J. M. Fiske & Company to it until subsequent to the time of the making of said deposit, when the same was, pursuant to the terms of the agreement existing between the

parties, set off against the indebtedness of the said firm of J. M. Fiske & Company to the defendant-appellant, and that said set off was legal and in accordance with the rights of the defendant-appellant pursuant to the terms of the Bankruptcy Act of 1898 and amendments thereto.

51. The said Court erred in holding and deciding that said defendant-appellant treated the said deposit of $54,058.08 as a partial payment of the indebtedness of J. M. Fiske & Company to it.

52. The said Court erred in not holding and deciding that said sum of $54,048.08 was received as a deposit on account of said firm's banking account with the defendant-appellant and was set off against said indebtedness subsequent to the deposit thereof.

53. The said Court erred in holding and deciding that the deposit of said sum of $54,048.08 constituted a preference as defined by Section 60 of the Bankruptcy Act of 1898 as amended, and that the transfer thereof is void by the complainants-appellees and that they are entitled to set the receipt by the defendant-appellant of said sum aside in accordance with the prayer of the bill of complaint.

Wherefore the defendant-appellant, The Mechanics' and Metals National Bank of the City of New York, prays that a decree of the United States Circuit Court of Appeals for the Second Circuit, dated the 19th day of December, 1912, affirming a decree of the United States District Court for the Southern District of New York dated the 8th day of January, 1912 may be reversed, and that said United States District Court may be directed to dismiss the bill of complaint herein together with costs.

Dated, New York, January 24th, 1913.

ADRIAN H. LARKIN,
Solicitor for Defendant-Appellant.

Office & Post Office Address, 54 Wall Street, Borough of Manhattan, City of New York.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Irving L. Ernst and others, as Trustees, &c. vs. The Mechanics & Metals National Bank of the City of New York. Assignment of Errors. Adrian H. Larkin, Solicitor for defendant, No. 54 Wall Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals, Second Circuit.

IRVING L. ERNST, LINDSAY RUSSELL, and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. Fiske et al., and J. M. Fiske & Company, Bankrupts, Plaintiffs,

against

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant.

Order Allowing Supersedeas.

The appellant, The Mechanics & Metals National Bank of the City of New York as aforesaid, having heretofore filed its petition for an

appeal from a final decree rendered herein on the 19th day of December, 1912, and entered in the office of the clerk of the United States Circuit Court of Appeals, Second Judicial Circuit, on the 23rd day of December, 1912, affirming the judgment of the District Court of the United States for the Southern District of New York herein dated the 8th day of January, 1912, and filed in the office of the Clerk of the United States District Court on the 9th day of January, 1912, and granting the prayer of the plaintiffs-appellees' bill of complaint upon the merits, with costs, and having filed an assignment of errors, and said appeal having been heretofore allowed to the petitioner The Mechanics & Metals National Bank of the City of New York, aforesaid, it is

Ordered that said appeal shall operate as a supersedeas of the decree herein of the 19th day of December, 1912, and shall stay the execution of said bill pending such appeal upon the execution of a bond in the penalty of the sum of two hundred and fifty-six thousand one hundred and fifty-three and 29/100 dollars ($256,153.29). On the consent of the attorneys for the plaintiffs-appellees the undertaking of the defendant-appellant without surety is accepted.

Dated New York, January 24, 1913.

H. G. WARD, *U. S. C. J.*

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Irving L. Ernst and others, as Trustees, &c. vs. The Mechanics & Metals National Bank of the City of N. Y. Order Allowing Supersedeas. Adrian H. Larkin, Solicitor for defendant, No. 54 Wall Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals, Second Circuit.

IRVING L. ERNST, LINDSAY RUSSELL, and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. Fiske et al., and J. M. Fiske & Company, Bankrupts, Plaintiff,

against

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant.

Know all men by these presents that The Mechanics & Metals National Bank of the City of New York is held and firmly bound unto the above-named plaintiffs, Irving L. Ernst, Lindsay Russell and Harford T. Marshall as Trustees in Bankruptcy of Arthur C. Sherwood, Dudley T. Humphrey, Clifford M. Washburn and Josiah M. Fiske individually and as copartners composing the firm of J. M. Fiske & Company and the firm of J. M. Fiske & Company, in the sum of two hundred and fifty-six thousand one hundred and fifty-three and 29/100 dollars ($256,153.29) to be paid to the plaintiffs, for the payment of which well and truly to be made said The Mechanics & Metals National Bank of the City of New York binds itself, its successors and assigns firmly by these presents.

Sealed with its seal and dated the 24th day of January, in the year of our Lord one thousand nine hundred and thirteen.

Whereas the above-named The Mechanics & Metals National Bank of the City of New York has heretofore prosecuted an appeal to the United States Circuit Court of Appeals for the Second Judicial Circuit to reverse the decree rendered in the above-entitled suit by the Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York on January 9th, 1912; and

Whereas said United States Circuit Court of Appeals for the Second Judicial Circuit has heretofore and on or about the 19th day of December, 1912, by its order duly entered affirmed said decree of the District Court of the United States rendered as aforesaid; and

Whereas the said The Mechanics & Metals National Bank of the City of New York has prosecuted an appeal to the United States Supreme Court from the said order of the United States Circuit Court of Appeals for the Second Judicial Circuit dated the 19th day of December, 1912;

Now, therefore the condition of this obligation is such, that if the above-named The Mechanics & Metals National Bank of the City of New York shall prosecute the said appeal to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed and delivered, Taken and acknowledged, this 24th day of January, 1913.

THE MECHANICS & METALS NATIONAL BANK OF THE CITY OF NEW YORK.

[SEAL.] By G. W. McGARRAH, *President.*

Attest:

[L. S.] J. S. HOUSE, *Cashier.*

STATE OF NEW YORK,
County of New York, ss:

On this 24th day of January, 1913, before me personally appeared Gates W. McGarrah, President of The Mechanics & Metals National Bank of the City of New York, to me known, who, being by me duly sworn did depose and say that he resides in the Borough of Manhattan, City, County, and State of New York; that he is the President of The Mechanics & Metals National Bank of the City of New York, the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order, and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law.

And the said Gates W. McGarrah further says that he is acquainted with Joseph S. House, and knows him to be the Cashier of said corporation; that the signature of said Joseph S. House sub-

scribed to the said instrument is the genuine handwriting of the said Joseph S. House and was thereto subscribed by the like order of the said Board of Directors and in the presence of him the said Gates W. McGarrah, President.

[SEAL.]

ARTHUR W. McKAY,
Notary Public, Kings Co.

Ctf. filed in N. Y. County, #20.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Irving L. Ernst, Lindsay Russell, &c. vs. The Mechanics & Metals National Bank of the City of New York. Bond. Adrian H. Larkin, Solicitor for defendant, No. 54 Wall Street, N. Y. City. The within undertaking is approved and surety thereon waived January 24th, 1913. Hays, Hershfield & Wolf, Solicitors for pl'ffs-resp'd't. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk. Approved. H. G. Ward, U. S. J. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 550 inclusive, (in 2 volumes) contain a true and complete transcript of the record and proceedings had in said Court, in the case of Irving L. Ernst, et al., as Trustees, etc., Complainants-Appellees, against Mechanics' & Metals National Bank of the City of New York, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of January in the year of our Lord One Thousand Nine Hundred and thirteen and of the Independence of the said United States the One Hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk*.

By the Honorable Henry G. Ward, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit, to Irving L. Ernst, Lindsay Russell, and Harford T. Marshall, as Trustees in Bankruptcy of Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske, and Arthur C. Sherwood, individually and as co-partners composing the firm of J. M. Fiske and Company, and the firm of J. M. Fiske and Company, Bankrupts, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden in the City of Washington District of Columbia, on the 22nd day of February, 1913, pursuant to an appeal filed in the Clerk's Office of the United States Cir-

cuit Court of Appeals for the Second Circuit, wherein The Mechanics and Metals National Bank of the City of New York is appellant and you are appellees to show cause, if any there be, why the decree in said cause mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Circuit above named, this 24th day of January, in the year of our Lord One Thousand Nine Hundred and thirteen, and of the Independence of the United States the One Hundred and Thirty-seventh.

H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Citation. Service of a copy of the within citation is hereby admitted. New York Jan. 24, 1913. Hays, Hershfield & Wolf, Att'y- for Compl'ts. United States Circuit Court of Appeals. Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

Endorsed on cover: File No. 23,530. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 955. The Mechanics' and Metals National Bank of the City of New York, appellant, vs. Irving L. Ernst, Lindsay Russell, and Harford T. Marshall, as trustees in bankruptcy of Dudley P. Humphrey et al. Filed February 1st, 1913. File No. 23,530.

Office Supreme Court, U. S.
FILED.
APR 30 1913
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 446

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as co-partners, composing the firm of J. M. Fiske & Company, and the firm of J. M. FISKE & COMPANY,
Complainants-Appellees,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant-Appellant.

Sirs.—Please take notice that a motion will be made, for the reasons hereto annexed, before the United States Supreme Court, at a session thereof, to be held at the Capitol, in the State of Washing-

ton, D. C., on Monday, the 5th day of May, 1913, at 12 o'clock noon, or as soon thereafter as counsel can be heard, for a rule or order advancing this cause and setting it down for hearing and argument on a day to be fixed by the Court.

Dated, New York, April 25, 1913.

Yours, &c.,

DANIEL P. HAYS,
Attorney for Complainant-Appellees,
Office & Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

To JOLINE, LARKIN & RATHBONE, ESQS.,
Attorneys for Defendant-Appellant,
#54 Wall Street, New York City.

SUPREME COURT OF THE UNITED STATES.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as co-partners, composing the firm of J. M. Fiske & Company, and the firm of J. M. FISKE & COMPANY,
Complainants-Appellees,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant-Appellant.

} Petition.

Now come IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, Trustees in Bankruptcy of the above named bankrupts, the complainants-appellees of record herein, by Daniel P. Hays, their counsel, and move this Honorable Court to advance the above entitled cause upon the calendar and set the same down for argument for a day certain because of the existence of certain special and peculiar circumstances, as follows:—

First.—This cause is similar to the cause of Hotchkiss *vs.* National City Bank, in which appeals are now pending before this Court, being Nos. 974 and 975 upon the October, 1912, Calendar of

this Court, which said appeals have been advanced upon motion of complainant therein and have been set for argument for October 14th, 1913.

Second.—The appeals in both this cause and the cause of Hotchkiss *vs.* National City Bank involve the question of the legality of certain transfers made under substantially the same circumstances. Both causes were tried at the same time before the same Special Master. Thereafter they were argued at the same time in the District Court. The appeals in both causes from the judgments of the District Court were placed together upon the Calendar of the Circuit Court of Appeals for the Second Circuit and the argument in the case of Hotchkiss *vs.* National City Bank followed immediately after the argument in this cause. The Circuit Court of Appeals in deciding said causes wrote one opinion covering both causes, stating, at the beginning of said opinion:

> "These cases are alike in respect to the main question involved, which is said to be of great importance to the business of stock brokers in the City of New York, and may be disposed of together as to it."

Third.—Complainants herein are the Trustees in Bankruptcy of the above named bankrupts, against whom a petition in involuntary bankruptcy was filed on January 19th, 1910. Complainants were thereupon appointed receivers in bankruptcy of said bankrupts and continued to act as such until May 5th, 1910, when they were duly elected trustees in bankruptcy of said bankrupts, in which capacity they have ever since continued to act.

Fourth.—The above entitled cause was brought to set aside the transfer of certain securities and money by the said bankrupts to the defendant, on the ground that such act was a preferential transfer. Decision was rendered in favor of the complainants in the United States District Court for

the Southern District of New York, which decision was thereafter affirmed by the United States Circuit Court of Appeals for the Second Circuit on or about the 11th day of April, 1912. Appeal has been taken by the defendant to this Court from the decision and this appeal is now pending and is numbered 955 upon the October, 1912, Calendar of this Court. This appeal will not be reached for argument in the regular course for at least two years and possibly not for a longer time.

Fifth.—The above entitled cause involves about $250,000, which, by the terms of the decision of the District Court and the Circuit Court of Appeals in complainants' favor, would be available for distribution to the creditors of the above named bankrupts. By reason of the appeal taken by the defendant to this Court, distribution of this amount will necessarily be delayed for probably two years or more. The pendency of this appeal is the principal obstacle in the way of closing up said bankrupts' estate, and a long delay in deciding the appeal will inevitably work a great hardship upon the creditors of said bankrupts.

Because of the foregoing facts, the undersigned prays this Court for a rule or order advancing said cause pursuant to sub-division 7 of Rule 26 of this Court and setting the argument of the appeal herein for the same day as that fixed for the argument of the cause of Hotchkiss *vs.* National City Bank, to wit: October 14th, 1913.

Respectfully Submitted.

DANIEL P. HAYS,
Attorney for Complainants-Appellees,
Office & Post Office Address #115 Broadway,
Borough of Manhattan, New York City.